Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS DONALD W. AGINS AND BONNIE G. AGINS

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

ELLEENE A. KIRKLAND
HOWARD E. SUSMAN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

	Page
Interest of amicus curiae	1
Summary of argument	4
Opinion below	7
Statement of the case	7
Argument	8
I	
The Federal constitution through the just compensation clause guarantees the availability of the money damages remedy to protect individual rights in property	8
A. Protection of property rights against government intrusion is a fundamental precept of the Federal constitution	8
B. No valid distinction can be drawn between the power of eminent domain and the police power which can justify limiting the availability of the money damages remedy	10
II	
The remedy of invalidation is wholly inadequate when considered in the light of principles of equity and fairness	17
A. Invalidation returns the problem to the entity which caused it in the first place	17
B. Invalidation does not achieve the cost distribution objective of the just compensation clause	19
III	
The public policy concerns of the California court can never justify circumscription of federally guaranteed rights	20
A. The perceived threat of fiscal harm cannot justify abrogation of constitutional rights	21
B. The availability of an inverse condemnation remedy will not adversely affect the planning process	22
IV	
Restriction of judicial remedies in the land use context will detrimentally affect the nation's housing consumers	24
Conclusion	26

TABLE OF AUTHORITIES CITED

Cases	Page
Agins v. City of Tiburon, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979)	passim
Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), decision vacated by stipulation of parties, 417 F. Supp. 1125 (1976)	15
Armstrong v. United States, 364 U.S. 40 (1960)	4, 13, 19
Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959)	15
Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974)	10
Eldridge v. City of Palo Alto, 57 Cal.App.3d 613 (1976)	19
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	9
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	8
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	9, 12
Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978)	10, 15
Griswold v. Connecticut, 381 U.S. 479 (1965)	5
Kaiser Aetna v. United States, ... U.S. ...., 48 U.S.L.W. 4045 (Dec. 4, 1979)	3
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ... U.S. ...., 59 L. Ed. 2d 401 (1979)	10
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	5, 26
Mugler v. Kansas, 123 U.S. 623 (1887)	8
Nebbia v. New York, 291 U.S. 502 (1934)	12
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)	3, 10, 21
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	9, 12, 22, 26, 27
Richmond Elks Hall Association v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977)	10, 14, 15
San Antonio River Authority v. Garrett Brothers, 528 S.W.2d 266 (Tex. 1975)	12, 13, 23
Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)	8
United States v. Fuller, 409 U.S. 488 (1973)	4
United States v. General Motors Corp., 323 U.S. 373 (1945)	15, 16
United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896)	26
United States v. Willow River Company, 324 U.S. 499 (1945)	13

TABLE OF AUTHORITIES

Statutes	Page
California Government Code:	
Section 65302(c)	24
Section 65858	18
Rule	
Rules of the Supreme Court of the United States, Rule 42	1
Constitutions	
United States Constitution, Fifth Amendment	3, 4, 5, 6, 8, 9, 12, 13, 14, 16
United States Constitution, Article I, section 10	8
Other Authorities	
Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law. 25, 44 (1973)	21, 22
Baumgardner, Takings Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 Sw. L.J. 723 (1976)	5, 18, 22
Berger, To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights, 8 Loy. L.A.L. Rev. 253 (1975)	11, 18
Comment: An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action —With a Proposal for Reform, 33 Albany L. Rev. 537 (1969)	23
Hagman, Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensations, 297 (1978)	21
Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967)	11, 22
1 Nichols on Eminent Domain, § 1.42[7] at 1-153 (3d rev. ed. 1979)	12
2 Nichols on Eminent Domain (3d rev. ed. 1979) § 6.13 at 6-65	16
Samuelson, Economics: An Introductory Analysis, 604 (6th ed. 1964)	25
Seidel, Government Regulations and Housing Costs, Rutgers University Center for Urban Policy Research (1977)	24

TABLE OF AUTHORITIES CITED

Other Authorities	Page
Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972)	5
Tribe, American Constitutional Law, § 5.1 at 224 (1978)	18
Urban Land Institute and Gruen, Gruen & Associates, Effects of Regulation on Housing Costs: Two Case Studies, Washington; Urban Land Institute (1977)	24
Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1 (1970)	11
Waite, Governmental Power and Private Property, 16 Cath. U.L. Rev.. 283 (1967)	11

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS DONALD W. AGINS AND BONNIE G. AGINS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants Donald and Bonnie Agins. PLF has filed a brief with this Court in support of the Jurisdictional Statement. Consent to the filing of this brief and the brief in support of the Jurisdictional Statement has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Agins appeal from the decision of the California Supreme Court which holds that they are not entitled to proceed to trial on the issue of whether compensation is required for a total loss of use of their residential ridgeland property by operation of the City of Tiburon's (City) open space zoning ordinance.

This case comes to the Court some eight years after the City of Tiburon had approved the sale of general obligation bonds for the purpose of purchasing Tiburon ridgeland for "open space" uses, had commenced condemnation proceedings to specifically acquire appellants' residential ridgeland property for open space preservation, and then abandoned that proceeding. It comes to the Court only after the City adopted zoning modifications applicable to appellants' property to achieve the open space uses the City apparently, at one time, believed could only be accomplished by exercise of the power of eminent domain. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 270-71 (1979), Appendix A at 2-4.[1] In this context the California Supreme Court rendered its decision.

The decision of the California Supreme Court appealed from holds that California property owners faced with oppressive and invalid land use regulation may not seek money damages by way of the inverse condemnation remedy, but may only seek invalidation of the offending regulation. *Agins*, 24 Cal. 3d at 276-77, Appendix A at 10-13.

Amicus finds the state court's elimination of the money damages remedy anomalous in light of this Court's pro-

[1]All references to the Appendix herein refer to the Appendix to the Jurisdictional Statement.

nouncement in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978), that it has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." This Court pointed out that it has examined the "taking" question by engaging in essentially ad hoc factual inquiries. *See also Kaiser Aetna v. United States*, ... U.S. ....., 48 U.S.L.W. 4045, 4048 (Dec. 4, 1979). The California Court has rejected this approach and denied appellants all opportunity to present facts to the trial court proving that a taking had occurred requiring compensation.

PLF believes that the *Agins* decision portends grave consequences to the general public in that the California court's decision would carve out a significant exception from the protections of the Fifth Amendment. The decision is based on the extremely disturbing and untenable notion that the protections afforded by the Fifth Amendment's Just Compensation Clause may ebb and flow in accordance with governmental or societal preference. Equally grave are the consequences of the decision to those in search of adequate and affordable housing. The same public policy concerns which lead the California Court to immunize municipalities from the financial consequences of their decision making will permit and even encourage the adoption of unnecessarily restrictive land use ordinances which will further diminish the opportunity to obtain adequate and affordable housing. PLF, by its participation herein, seeks to avoid not only the evisceration of basic constitu-

tional protections, but also seeks to avoid the adverse societal consequences which would flow from the California Court's decision.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

SUMMARY OF ARGUMENT

1. The decision of the California Supreme Court poses a serious threat to the integrity of the individual right of property. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period (*i.e.*, the period when the offending regulation is effective), by a single landowner. To impose such burden would defeat the distributional policy of the Just Compensation Clause. The Fifth Amendment guarantee that private property shall not be taken for a public use without first paying just compensation is grounded in the belief that government should not be allowed to force some people to bear the costs of achieving some public good which should be borne by the public as a whole. *See Armstrong v. United States,* 364 U.S. 40, 49 (1960). As this Court stated in *United States v. Fuller,* 409 U.S. 488, 490 (1973), "The constitutional requirement of just compensation derives as much content

from the basic equitable principles of fairness [citations omitted], as it does from technical concepts of property law." To require the individual landowner to bear the burdens associated with promoting public goals such as open space preservation or preservation of scenic vistas along the California coast would violate the principles of fairness upon which the Just Compensation Clause is based.[2]

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. A means for real protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut,* 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972). The remedy of invalidation is not sufficient by itself to safeguard constitutional guarantees contained in the Fifth Amendment and to effectuate the distributional policy of the Just Compensation Clause. Elimination of the damages remedy strikes at the very heart of the institution of private property. Justice William P. Clark cogently summed up the result in his dissent:

> "Today's decision effectively pronounces that henceforth in California title in real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising

---

[2] *See* Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L. Rev. 553 (1972); Baumgardner, *Takings Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances,* 30 Sw. L.J. 723 (1976).

legislative powers elects without compensation." *Agins*, 24 Cal. 3d at 282 (Clark, J., dissenting), Appendix A at 21.

2. Amicus takes the position that a California owner whose property becomes subject to unconstitutional regulation cannot effectively protect his rights if he is limited to the remedy prescribed by the California Supreme Court. PLF contends that where a zoning ordinance effects a "taking" of property within the meaning of the Just Compensation Clause of the Fifth Amendment, invalidation of the ordinance does not vindicate or protect the rights of the property owner. In effect, the aggrieved landowner is left with a "nonremedy."[3] This is especially true when the enormous costs of litigation are considered together with the impossibility of monetary recovery and the likelihood that, if ultimately invalidated, slight revision of the offending regulation may require repeated litigation. Under such conditions, the remedy, for all practical purposes, is available only to the very wealthy landowner. PLF believes that a full measure of protection thus is afforded only

[3]As regards the value of the invalidation remedy, Justice William P. Clark stated in his dissenting opinion in *Agins:*

> "[T]he majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties." *Agins v. City of Tiburon*, 24 Cal. 3d 266, 283 (1979) (Clark, J., dissenting), Appendix A at 23.

where the inverse condemnation remedy is available. Invalidation frequently has the effect of perpetuating the injury, while damages in inverse condemnation fulfill the guarantee of just compensation.

3. The policy concerns expressed in the decision of the California Supreme Court assume that there is a higher importance in achieving varying public goals than in maintaining the integrity of basic constitutional guarantees. The perceived threat of fiscal harm to municipalities and chilling impact on the land use planning process cannot justify the evisceration of constitutional rights.

4. The vast majority of the nation's housing consumers will be adversely affected by the *Agins* decision. By holding invalidation to be the sole remedy to correct unconstitutional land use regulation the California Court would absolve communities from the consequences of their decision making and thereby add to the risk and delay incident to housing production. The decision will not only result in less housing at increased cost, but will also make entry into the housing market an experience reserved for an exclusive few.

OPINION BELOW

The opinion of the California Supreme Court is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979). A copy of the opinion is attached as Appendix A to the Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case as it appears in the brief for appellants.

ARGUMENT

I

THE FEDERAL CONSTITUTION THROUGH THE JUST COMPENSATION CLAUSE GUARANTEES THE AVAILABILITY OF THE MONEY DAMAGES REMEDY TO PROTECT INDIVIDUAL RIGHTS IN PROPERTY

A. Protection of Property Rights Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

The real issue in this case is "the extent to which a court will permit . . . governmental intrusion into a constitutionally protected area." *Agins*, 24 Cal. 3d at 281 (Clark, J., dissenting), Appendix A at 20.

For nearly two centuries, American political scientists and legal scholars have pointed to protection of individual property rights as the fundamental motivation for adoption of the Federal Constitution. In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, U.S. Const., Art. I, § 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas*, 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment

guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, individual rights in property have been compromised and sometimes totally disregarded. Without question, individual rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), "In a changing world it is impossible that it should be otherwise."

Although an owner's freedom to use, enjoy, and derive profit from property has been severely diminished, the individual whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. In the land use regulatory context, the remedy of money damages is required by the Fifth Amendment. By this constitutional provision, the landowner is

guaranteed just compensation when his property is taken. Without question land use regulation can effect a "taking." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. ....., 59 L. Ed. 2d 401 (1979). In the event that it does, logical application of the constitutional guarantee requires either that the "taking" be eliminated or that just compensation be provided. Invalidation of an offending regulation neither removes the "taking" (*see* Argument II, *infra*), nor provides compensation. Inverse condemnation on the other hand provides the required just compensation. Therefore, unless an offending regulation can be challenged by inverse condemnation, a landowner has no means of enforcing his constitutionally guaranteed rights. Without the remedy, the Just Compensation Clause would be meaningless in the land use regulatory context. This compels the conclusion that the availability of inverse condemnation to challenge a land use regulation is affirmatively required by the clause. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330-32 (9th Cir. 1977).

B. No Valid Distinction Can Be Drawn Between the Power of Eminent Domain and the Police Power Which Can Justify Limiting the Availability of the Money Damages Remedy

The California Supreme Court holds, in essence, that compensation need only be paid where the power of eminent

domain has been exercised or an actual property interest has been appropriated through physical invasion. According to the *Agins* majority, no similar requirement arises from the exercise of the police power. *Agins*, 24 Cal. 3d at 272-73, Appendix A at 5-7. The attempt to identify distinctions between the two powers, and based upon those distinctions, determine the availability of the money damages remedy, has been thoroughly analyzed by legal scholars.[4] The conclusion, however, that utilization of one power or the other is determinative of the availability of the inverse condemnation remedy has clearly fallen into disfavor. The attempted distinction has been variously described as "illusory,"[5] "word play,"[6] or "largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric."[7]

It appears to be based upon an identification of two separate and distinct powers: one to acquire and one to regulate. However, the distinction is not supported by sound judicial reasoning or public policy considerations where the ultimate result of the governmental action has been to effect a taking of private property for public use without the payment of compensation.

---

[4]Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loy. L.A.L. Rev. 253 (1975); Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283 (1967); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1181 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1 (1970).

[5]Waite, *supra* note 4 at 291.

[6]Michelman, *supra* note 4 at 1186.

[7]Van Alstyne, *supra* note 4 at 2.

It is plain that "the police power is but another name for the power of government." 1 *Nichols on Eminent Domain,* § 1.42[7] at 1-153 (3d rev. ed. 1979); *accord, Nebbia v. New York,* 291 U.S. 502, 524 (1934). Inasmuch as the various protections afforded by the Fifth Amendment operate as limitations on the power of government, they similarly operate to limit the police power. *Goldblatt v. Hempstead,* 369 U.S. at 590.

This hollow dichotomy has been specifically addressed by the courts within the zoning context. Thus, while the court in *San Antonio River Authority v. Garrett Brothers,* 528 S.W.2d 266, 273 (Tex. 1975), acknowledged the validity of the dictum by Justice Holmes that " 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law,' "[8] the court also acknowledged that it "must not lose sight of the fact that by express constitutional provision government must pay in certain cases."

With regard to the traditional police power—eminent domain dichotomy, which lies at the root of the notion that compensation is not required for losses occasioned by the proper exercise of the police power, the *San Antonio* court stated:

> "The attempted distinction is, at best, illusory. If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. The empty formalism of 'police power' cannot be made the basis for denying compensation and the Texas

[8] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922).

> Supreme Court has expressly refused to 'compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of problems arising under Article I, Sec. 17, of the Constitution.' " *Id.* at 273 (citations omitted).
>
> "Where there has been a temporary taking or damaging, the landowner is entitled to recover such sum as would compensate for loss of profits and necessary expenditures." *Id.* at 274.

No distinction should be made between the two powers insofar as the parameters of the protection afforded by the Fifth Amendment is concerned. The protection afforded by the Just Compensation Clause of the Fifth Amendment has been variously stated; however, the intent of the provision is clear:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. at 49.

Similarly, this Court has stated in *United States v. Willow River Power Company,* 324 U.S. 499, 502 (1945) that:

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

The distributional policy basic to the Just Compensation Clause is equally applicable where an exercise of the police

power results in private property being devoted to public use. It matters not what labels are attached to the particular action. The governmental action must be measured by its ultimate result, not by its categorization as an exercise of either the eminent domain power or the police power.

The motivating force behind the adoption of open space ordinances is to retain property in its unused, undisturbed, and natural state so that open spaces and scenic vistas may be preserved and used by the public. Such goals are properly achieved through the exercise of the powers of eminent domain since they are calculated, primarily, to benefit the public. Just as there is an entitlement to money damages where the governmental entity realizes a public purpose by exercising the power of eminent domain, so also there is such an entitlement when private rights in property are extinguished by a governmental choice to achieve the same goal pursuant to the police power. No attempt to avoid liability by the fixing of labels can be countenanced and still afford that protection contemplated by the Fifth Amendment. In the recent Ninth Circuit case of *Richmond Elks Hall Association v. Richmond Redevelopment Agency,* 561 F.2d at 1330, the court stated:

> "When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid."

Moreover, the court expressly rejected the argument that governmental actions pursuant to the police power fail to give rise to liability:

> "Regarding Agency's argument that it acted pursuant to the police power of the State and therefore is not liable for its taking of Elks' property, we observe that the very authority cited by Agency, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), refutes its contention. *Berman* involved the rights of property owners whose properties were taken by a redevelopment agency pursuant to the exercise of the State's police power. Under such circumstances the Court observed that '[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.' *Id.* at 36, 75 S.Ct. at 104. It is clear from *Berman* that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects. Therefore, assuming *arguendo* that Agency in the instant case exercised legitimate police power, it still must pay for its taking of Elks' property." *Id.* at 1332.

See also Gordon v. City of Warren, supra; *Arastra Limited Partnership v. City of Palo Alto,* 401 F. Supp. 962 (N.D. Cal. 1975), *decision vacated by stipulation of parties,* 417 F. Supp. 1125 (1976); *Bydlon v. United States,* 175 F. Supp. 891 (Ct. Cl. 1959).

By its decision in this case, the court limits the use of inverse condemnation to those cases in which government "takes" private property by physical invasion (*i.e.*, by impliedly exercising the power of eminent domain). To draw this distinction between physical taking of property and denial of substantially all use thereof is to reject universally accepted notions of the concept of property. It is ironic that the *Agins* majority cites this Court's clear definition of "property" which appears in *United States v. Gen-*

eral Motors Corp., 323 U.S. 373 (1945). *Agins*, 24 Cal. 3d at 273, Appendix A at 7. As it is used in the Just Compensation Clause of the Fifth Amendment, "property" denotes

> "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . In other words, it deals with . . . the individuals' 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple,' or it may be a [lesser interest]. . . . *The constitutional provision is addressed to every sort of interest the citizen may possess.*" *United States v. General Motors Corp.*, 323 U.S. at 377-78 (emphasis added).

Moreover, it has been expressly acknowledged that deprivation of an owner's right of user can constitute a taking.

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." *2 Nichols on Eminent Domain*, § 6.13 at 6-65 (3d rev. ed. 1979). *Accord, United States v. General Motors Corp.*, 323 U.S. at 378.

The distinction thus drawn by the California court between physical appropriation and an unlawful appropriation of a right of use as regards the right to money damages is one that has neither been accepted by this Court, nor should be. To do so is to drastically modify fundamental concepts of property and to abrogate constitutional guarantees.

Amicus believes that a citizen is entitled to money damages when the government appropriates his interest in the *use* of his property, even if only for a temporary period, as well as when it takes his interest in *physical possession*. Right of user is one of the most important and fundamental of the bundle of rights associated with the ownership of property.

II

THE REMEDY OF INVALIDATION IS WHOLLY INADEQUATE WHEN CONSIDERED IN THE LIGHT OF PRINCIPLES OF EQUITY AND FAIRNESS

Amicus strongly urges that there is no real relief provided by the invalidation remedy afforded by the California Supreme Court. *Agins*, 24 Cal. 3d at 269-70, Appendix A at 1. It is illusory at best and in practice actually perpetuates the injury imposed by the invalidated ordinance.

A. Invalidation Returns the Problem to the Entity Which Caused It in the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains desirable. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent. There is the possibility that the agency may decide to exercise its power of eminent domain, but as discussed below, that is unlikely.

It is fundamental to our system of government that courts must defer as much as possible to legislative judgments concerning the manner in which public objectives will be achieved. But legislatures have a concomitant duty to avoid unfairness and to assess the constitutionality of their actions independent of what the courts may require. Tribe, *American Constitutional Law*, § 5.1 at 224 (1978). Unfortunately, lawmakers have frequently failed to fulfill these responsibilities in the area of land use regulation. The question of constitutionality is often given to the court without much consideration by the municipality. One commentator cites this as a major flaw in the invalidation remedy. Berger, *supra* note 4; Baumgardner, *supra* note 2 at 737-38.

The *Agins* decreed remedy thus can have devastating practical effects on the property owner. While attempted resolution of the controversy bounces from court to city council and back again (with great, and sometimes prohibitive, legal costs), the landowner is deprived of the fruitful use of his property,[9] In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate pursuant to California Government Code § 65858 and enact a moratorium, pending reconsideration of the challenged ordinance, for up to two years. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

[9]It must be considered that in this case it has been approximately seven years since the Agins filed their claim for damages. All the while the Agins have been subject to the challenged zoning ordinance which by express allegation has deprived them of all beneficial use. *Agins*, 24 Cal. 3d at 279 (Clark, J., dissenting), Appendix A at 17.

Where, as here, the public objective is open space preservation, benefits accrue to the public during the course of this process. For this public *use* of his land, the landowner will receive *no* compensation if invalidation is his sole remedy.[10] This is patently violative of the constitutional guarantee of just compensation.

B. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause has long been upheld by this Court. *Armstrong v. United States,* 364 U.S. at 49.

In the aftermath of litigation resulting in invalidation, it can be assumed that the objectives embodied in the challenged ordinance will be achieved nonetheless. During that period and the preceding period of the ordinance's legal

[10]In *Eldridge v. City of Palo Alto,* 57 Cal. App. 3d 613 (1976), defendant city initiated severely restrictive measures on plaintiffs' land in 1969 with a development moratorium imposed pending completion of land use studies. The moratorium was extended twice while the city examined "the open-space problems." In 1972, the city announced the allocation of funds for purchase of plaintiffs' land. Shortly thereafter, their land was designated in the general plan for open space, while the city announced it was exploring how to best use the "open-space funds." It then authorized the purchase of some open space lands. Nevertheless, plaintiffs' land was zoned for open space. Opening Brief for Appellant, Donald F. Eldridge, at 32-40. Suit was instituted in 1973 seeking damages in inverse condemnation. Defendants' demurrer to the complaint was sustained by the trial court, but on appeal in 1976, that decision was reversed. The appellate court held that a cause of action in inverse condemnation had been stated. By then, seven years had passed during which plaintiffs' use of their property had been effectively frozen and the public enjoyed the benefits of open space at the expense of the landowners. The *Agins* court subsequently disapproved the *Eldridge* decision. *Agins,* 24 Cal. 3d at 273, Appendix A at 6. All those property owners similarly situated to *Eldridge* are thus without any effective remedy to defend against even the most egregious of municipal conduct.

effectiveness, the impacted landowner is shouldering a burden which should be borne by the community as a whole. This is sacrificing the individual to the community. Even at the moment the court concludes that the landowner is paying more than his fair share and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

III

THE PUBLIC POLICY CONCERNS OF THE CALIFORNIA COURT CAN NEVER JUSTIFY CIRCUMSCRIPTION OF FEDERALLY GUARANTEED RIGHTS

The *Agins* majority indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins,* 24 Cal. 3d at 276-77, Appendix A at 12. Amicus submits that these concerns, even if well founded, cannot be allowed to abrogate federally guaranteed constitutional rights. The concerns, however, are not well founded. Indeed, considerations of effective planning and economic impact counsel in favor of an opposite result.

A. The Perceived Threat of Fiscal Harm Cannot Justify Abrogation of Constitutional Rights

The California court's opinion reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. The court may not cause the strength of the Just Compensation Clause of the Federal Constitution to ebb and flow with the changing conditions of government or societal preference. This Court has indicated that the economic impact of regulation on the claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn Central,* 438 U.S. at 124. The California court ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. "If there are such liabilities to government, there must be staggering losses to private owners."[11] The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[12] In this connection, "it

---

[11]Hagman, Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensations* 297 (1978).

[12]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law. 25, 44 (1973).

would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all."[13] As Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon:*

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416.

B. The Availability of an Inverse Condemnation Remedy Will Not Adversely Affect the Planning Process

The California court concluded that an inverse condemnation remedy would detrimentally restrict local planners in the performance of their duties. The creativity of planners would in no way be inhibited by the threat of damage awards based on unconstitutional regulation. It is their function to develop workable means for the achievement of legitimate public objectives. The availability of the inverse condemnation remedy helps to define the parameters of responsible action and guards against violating those limitations established by the Federal Constitution.[14]

The availability of the inverse condemnation remedy would benefit the land use planning process. Unlike invalidation, this remedy preserves the integrity of a comprehensive plan in the event a component zoning ordinance is successfully challenged. When an ordinance is invalidated, the continued viability of the entire planning scheme, of which the ordinance was a part, is called into question. By upsetting a zoning ordinance on the basis of its application to one parcel, the comprehensiveness of a regional plan is destroyed. It is contrary to good common sense to invalidate an otherwise valid and beneficial regulation which imposes hardship on only one (or a few) individual(s) when the hardship can be alleviated through the payment of damages. In fact, it has been suggested that "[t]he criteria for determining whether to allow an award should be whether it would upset an entire regulatory scheme to invalidate the statute." *Comment: An Evaluation of the Rights and Remedies of a New York Landowner for Loses Due to Government Action—With a Proposal for Reform,* 33 Albany L. Rev. 537, 550 (1969).

Amicus submits as regards the imagined detrimental effects which may flow from the availability of the money damages remedy that the Texas Court of Civil Appeals in *San Antonio River Authority v. Garrett Brothers, supra,* has provided a well reasoned response. The court stated:

> "To hold a governmental agency liable . . . will not cause the heavens to fall, nor will it transform government into a giant shackled into inactivity by the fear of potential liability. It will still be free to enact zoning ordinances, building codes, health regulations, traffic laws, etc. In brief, it will still be able to 'govern' without fear of financial disaster. The only result will be that it will not be able to 'rig' the market in its favor. That is, government will merely be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern." *San Antonio River Authority v. Garrett Brothers,* 526 S.W.2d at 274.

---

[13]Michelman, *supra* note 4 at 1181.

[14]See *Baumgardner, supra* note 2 at 736-38; Badler, *supra* note 12 at 53-55.

IV

RESTRICTION OF JUDICIAL REMEDIES IN THE LAND USE CONTEXT WILL DETRIMENTALLY AFFECT THE NATION'S HOUSING CONSUMERS

Government regulation in the 1970's has been responsible for a dramatic increase in the price of housing. Numerous studies have documented the inflationary impact of housing regulation.[14] They point out that government policy and regulation have been significant factors responsible not only for the creation of a housing scarcity, which has forced prices to escalate, but also for pronounced reduction in the number of people who can buy new homes.[15]

The California Legislature has recognized the problems incident to the provision of adequate and affordable housing and to that end has mandated that California communities "make adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c).

The *Agins* decision thwarts legislatively established housing policy and the interests of those in search of affordable housing by further increasing the risks associated with the production of housing. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid

[14] *See, e.g.*, Urban Land Institute and Gruen, Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies*, Washington, D.C., Urban Land Institute (1977); and Seidel, *Government Regulations and Housing Costs*, Rutgers University Center for Urban Policy Research (1977).

[15] The Urban Land Institute and Gruen, Gruen & Associates' study points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 15 at 1.

regulations or arbitrary and capricious governmental action, that risk factor is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[16]

The added risk factor discourages entry into the market, reducing competition, and results in less housing at higher prices. The *Agins* decision, creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem. The problem is evidenced by the impassioned cry for rent control ordinances, condominium conversion ordinances, and similar regulations. Furthermore, an ever increasing segment of the public sees the problem in unconscionable housing prices which prevent social and economic mobility through home ownership.

The same policy which allows cities and towns to exclude housing through zoning ordinances without any fear of adverse financial consequences, also permits community decision makers, as a corollary, to exclude any socioeco-

[16] Samuelson, *Economics: An Introductory Analysis* 604 (6th ed. 1964).

nomic segment of society it might find undesirable. Justice William P. Clark, in his dissenting opinion, noted in this regard:

> "The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.
>
> . . . .
>
> "Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment." *Agins,* 24 Cal. 3d at 283-84 (Clark, J., dissenting), Appendix A at 23-24.

This policy can only be characterized as contrary to the public interest.

CONCLUSION

The decision of the California Supreme Court has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch v. Household Finance Corp.,* 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and the liberties which flow from the exercise of the right. The right to receive just compensation for private property taken for a public use, whether it be open space preservation or another purpose, has long been heralded as an essential protection against governmental abuse and discrimination. *United States v. Gettysburg Electric Railway Co.,* 160 U.S. 668, 680 (1896). It was in *Pennsylvania*

Coal Co. v. Mahon that Justice Holmes observed that the Just Compensation Clause protects against the destruction of private property resulting from the unlimited exercise of the police power. The interests in immunizing communities from financial liability cannot warrant abrogation of that constitutional guarantee.

For the foregoing reasons amicus curiae Pacific Legal Foundation respectfully urges that the decision of the California Supreme Court be reversed.

Respectfully submitted,

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

ELLEENE A. KIRKLAND
HOWARD E. SUSMAN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

February, 1980